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25 April 2008
by express

Hon. Anne Quinlan
Secretary
Surface Transportation Board
395 E Street SW
Washington, D.C. 20024

Section of Environmental Analysis
Surface Transportation Board
395 E Street SW
Washington, D.C. 20024

Mr. Mel Clemens
Director
Office of Compliance and Consumer Assistance
Surface Transportation Board
395 E Street SW
Washington, D.C. 20024

ENTERED
Office of Proceedings
APR 28 2008
Part of
Public Record

Re: Consolidated Rail Corporation - Abandonment
Exemption - in Hudson County, NJ,
AB 167 (Sub-no. 1189X) and related proceedings.

Madams/Sirs:

This letter is on behalf of City of Jersey City, the
Pennsylvania Railroad Harsimus Stem Embankment Preservation
Coalition ("Embankment Coalition"), and Rails to Trails
Conservancy (collectively referred to as "Commenters").

Consolidated Rail Corporation (Conrail) submitted an
"environmental report" (ER) and an "historic report" (HR) for a
proposed fast-track "class exemption" abandonment pursuant to a
letter dated March 6, 2008, in this proceeding. Because of the
abbreviated period suggested in the cover letter (three weeks)
within which to provide comments on the ER/HR, and because the
railroad represented that it intended to file a class exemption
on or about April 7, 2008, Commenters hastened to provide
comments, which we also supplemented, as quickly as possible, and

certainly prior to April 7. Commenters understand that many other entities also filed comments concerning Conrail's manifestly inadequate ER/HR and the proposed action (abandonment) which it embodies.

By letter dated April 17, 2008, Conrail advised the Board that it is postponing filing a class exemption notice, purportedly to address the comments. In light of Conrail's postponement, Commenters wish to draw the Board's attention, and Conrail's, to two additional concerns.

I.

City, the Embankment Coalition and RTC are concerned that Conrail (along with its developer ally "SLH Properties,"¹ the entity to whom Conrail unlawfully sold the Harsimus Branch without STB abandonment authority) is simply buying more time to continue to thwart this Board's jurisdiction at the local level.

In a state court suit in which Conrail is participating, SLH Properties obtained a trial court order dated March 28, 2008, requiring Jersey City regulatory bodies (over the City's opposition) to ignore this Board's actions and to process SLH/Conrail permits to destroy the Harsimus Branch solely under local law. See Exhibit A.

The March 28 order in the view of Commenters is literally an unconstitutional order, in that it ignores the Supremacy Clause, 49 U.S.C. 10501(b), and this Board's decision in City of Jersey City, et al., Petition for a Declaratory Order, STB Finance Docket 34818, served August 8, 2007. The latter decision held that the Harsimus Branch is a "line of railroad" over which this Board, not City of New Jersey or the Superior Court of Hudson County, has abandonment jurisdiction. Since no one has sought, much less obtained, abandonment authority for the Harsimus Branch as germane here, it is plainly improper to treat it as abandoned, much less to require the City to so treat it. That is extraordinarily prejudicial to the Commenters rights before this agency, including their rights to seek compliance with NEPA, NHPA, and other relevant statutes before abandonment is authorized, and certainly before it is consummated. To make

¹ SLH Properties as used herein refers to the series of LLC's, all under common control, that intervened on the side of Conrail in F.D. 34818, otherwise known as "212 Marin Boulevard, et al." See Decision in F.D. 34818, served August 8, 2007, at footnote 2.

..

matters worse, Conrail's chosen developer has sued the City and Joanne Monahan (an assistant city attorney) for civil rights violations (28 U.S.C. 1983) due to alleged delays by the City in allowing destruction of the Harsimus Branch. But section 1983 suits for delay when the delay is the result of Conrail's (and SLH's) failure to act lawfully under the ICC Termination Act is nothing more than an indirect attack on this Board's authority. This contravenes decisions like Dave v. Rails to Trails Conservancy, 79 F.3d 940 (9th Cir. 1996) (upholding trial court dismissal of section 1983 claim against RTC and various Washington State officials as indirect attack on STB orders and jurisdiction).

Conrail's continued active efforts to destroy the Harsimus Branch in the face of this Board's clear jurisdiction is perhaps best manifest in the certificates which we attach as part of Exhibit B. These certificates, all signed on December 13, 2007, by Jonathan Broder, Conrail's Vice President and General Counsel, state that Conrail joins in and consents to issuance of demolition permits for the Sixth Street Embankment. Moreover, Mr. Broder for Conrail also indorses the issuance of a Certificate of Economic Hardship, which if issued would further justify under local law immediate demolition of the Embankment.

Mr. Broder's actions on behalf of Conrail fly in the face of City of Jersey City, et al., Petition for a Declaratory Order, STB Finance Docket 34818, served August 8, 2007. In that decision, STB determined that the Harsimus Branch was a "line of railroad" for which Conrail needed abandonment authority. Yet on December 13, 2007, Mr. Broder for Conrail is found seeking and supporting demolition authority for the Embankment without any abandonment authority from this agency whatsoever.

STB on April 23, 2008, issued a policy statement which included the following language, obviously directly germane here:

"In some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When this occurs on inactive lines, we generally do not discover these actions until after the fact when the carrier seeks abandonment authority. Such actions are unlawful. Not only is the rail line unlawfully severed from the national transportation system when this occurs, but the Board's ability to carry out its obligations under NEPA and NHPA may then be adversely affected. The Board will continue to carry out its obligations under those statutes and will take whatever steps necessary to enforce compliance with them."

Preservation and Other Environmental Conditions, STB Ex Parte No. 678, served April 23, 2008, slip op. at p. 4.

Obviously Conrail is knowingly continuing to flout this Board's jurisdiction. Conrail knows that the Harsimus Embankment, which it is seeking through City permits to demolish immediately, is eligible for listing on the National Register of Historic Places (we have already supplied this Board with relevant papers so establishing). Now SLH has obtained an order that in effect requires the City to authorize demolition under local law considerations only, without taking into account STB's authority. The only possible conclusion is that the railroad in alliance with its chosen developer (SLH) is intentionally attempting to thwart this Board's ability to carry out its obligations under NEPA and NHPA. They certainly are working to foreclose options that would preserve the Embankment, and the Branch, before this Board has even had a chance to address the subject.

Conrail's unlawful efforts are in keeping with a letter Mr. Broder for Conrail sent to Mayor Healy of Jersey City dated October 23, 2007. In that letter, Mr. Broder appeared to call on the City to support a proposal by the railroad's chosen developer to put towers on the Embankment, gut it for parking, and move rail uses to congested city streets, and to support similar actions on 18 acres of additional railroad-owned properties in the City. In other words, Conrail's objective appears to be to ignore NEPA, NHPA and other remedial statutes not only on the Harsimus Branch. Indeed, Conrail is taking actions, and encouraging and supporting actions of others, to destroy the very assets NEPA and NHPA are supposed to protect before it even seems abandonment authority.

In keeping with the Policy Statement, the Board needs to take whatever steps are necessary to stop Conrail and the developer with which it has allied from thwarting this Board's jurisdiction, and from continued efforts that serve no purpose other than to adversely affect this Board's ability to discharge its duties under NEPA and NHPA. The Conrail sale to SLH, and all its de facto abandonment actions to date on the Branch, are unlawful. Conrail and SLH through their dogged and continuing efforts in state court to compel local officials to ignore this agency's authority, and through their delay in starting any kind of federal licensing process, appear to be seeking to draw maximum benefit from their unlawful conduct. They are not preserving the status quo, much less seeking to ameliorate the adverse consequences of what they have already and unlawfully done to date.

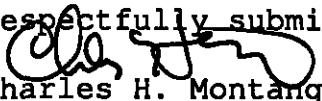
done to date.

II.

City, RTC and Embankment Coalition are concerned that Conrail has not accurately identified the Harsimus Branch in the maps filed with its ER/HR. Conrail's map purports to show it bending in a southeasterly direction at a point after it reaches Marin Boulevard. The Branch was the former Pennsylvania Railroad mainline to what effectively was a port facility (the Harsimus Cove) and at least one line would extend (in keeping with track charts) at least to water's edge. If and when Conrail seeks abandonment authority, it needs correctly to reflect the historic location of the Branch. This could be germane for connectivity of various rail transportation uses that one or more of the Commenters intend to seek in this proceeding, if Conrail ever formally initiates it. Commenters reserve all their rights to contest gerrymandering by Conrail of the Harsimus Branch.

By my signature below, I certify service of this document upon John K. Enright, counsel for Conrail, 1000 Howard Boulevard, 4th Floor, Mt. Laurel, NJ 08054 by U.S. Mail, postage pre-paid, on the date above.

Respectfully submitted,


Charles H. Montange
for City of Jersey City,
Pennsylvania Railroad Harsimus Stem
Embankment Preservation Coalition, and
Rails to Trails Conservancy

Of counsel:

Andrea Fester
General Counsel
Rails to Trails Conservancy
2121 Ward Court, NW, 5th Floor
Washington, D.C. 20037

Exhibits:

- A - March 28, 2008, state court order
- B - Conrail consents and joinders in demolition permits

cc. Jersey City

Coalition

RTC

Mr. Terry Karshner, Deputy

NJ Historic Preservation Office

NJ Department of Environmental Protection

P.O. 404

Trenton, NJ 08625-0404

Mr. Enright (Conrail)

Mr. Fritz Kahn

1920 N Street NW (8th Floor)

Washington, D.C. 20036-1601 (SLH Properties)

Exhibit A

Michele R. Donato, Esq.
106 Grand Central Avenue
P.O. Box 145
Lavallette, NJ 08735-0145
(732) 830-0777
Attorney for Plaintiffs

COPY

FILED

MAR 28 2008

MAURICE J. GALLIPOLI, A.J.S.C.

212 MARIN BOULEVARD, LLC,
247 MANILA AVENUE, LLC,
280 ERIE STREET, LLC,
317 JERSEY AVENUE, LLC,
354 COLE STREET, LLC,
389 MONMOUTH STREET, LLC,
415 BRUNSWICK STREET, LLC,
and 446 NEWARK AVENUE, LLC,

Plaintiffs,

v.

CITY OF JERSEY CITY, JOANNE
MONAHAN, ASSISTANT
CORPORATION COUNSEL AND THE
PLANNING BOARD OF THE CITY OF
JERSEY CITY,

Defendants,

and

CITY OF JERSEY CITY,

Third-Party Plaintiff,

v.

CONSOLIDATED RAIL
CORPORATION,

Third-Party Defendant.

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
LAW DIVISION
DOCKET NO. L-4908-05

Civil Action

ORDER LIFTING RESTRAINTS AND
AUTHORIZING PLAINTIFFS TO
PURSUE DEVELOPMENT APPROVALS
AND PERMITS DURING THE STAY
OF LITIGATION

THIS MATTER having been brought before the Court by
Plaintiffs on a Motion to Reconsider the Prohibition on

Obtaining Development Approvals and Permits during the stay of litigation; and

Michele R. Donato, Esq. and Carmine Alampi, Esq. appearing on behalf of Plaintiffs; John K. Fiorilla, Esq. appearing on behalf of Third Party Defendant, Consolidated Rail Corporation, and John J. Curley, Esq., appearing on behalf of the City of Jersey City and Joanne Monahan, Assistant Corporation Counsel; and

The Court having considered the papers submitted in support of the motion together with any opposition papers submitted; and the Court having heard oral argument on the motion; and for good cause having been shown;

IT IS on this 28th day of March, 2008 ORDERED as follows:

1. Plaintiffs are entitled to pursue development applications, certificates of appropriateness and related approvals before the appropriate municipal agencies in the City of Jersey City; and

2. These applications and approvals shall be considered without regard to the decision of and proceedings before, the Surface Transportation Board. ~~The pending abandonment application does not affect the jurisdiction of municipal agencies to hear and decide applications filed by Plaintiffs and Conrail.~~

~~3. The City of Jersey City, Corporation Counsel, and the City's agents, attorneys and consultants are enjoined from raising and presenting any issues before the Planning Board, the Historic Preservation Commission and any municipal agency with jurisdiction, regarding the issues of railroad abandonment, the validity of title, ownership of Plaintiffs' property and the possible condemnation of Plaintiffs' property.~~

~~4. The Jersey City Planning Board, the Historic Preservation Commission and any municipal agency with jurisdiction are enjoined from considering any evidence or information regarding the issues of railroad abandonment, the validity of the title, ownership of Plaintiffs' property and the possible condemnation of Plaintiffs' property.~~

5. Any decision of the appropriate municipal agency shall ~~not be based on abandonment, validity of title, ownership of Plaintiffs' property and the possible condemnation of Plaintiffs' property,~~ but shall be based on legitimate land use and historic preservation considerations as set forth in the Zoning Ordinance of the City of Jersey City.

IT IS FURTHER ORDERED that a copy of this Order be served upon all parties within ⁷⁻~~ten~~ days of the date of this Order.


Maurice J. Gallipoli, A.J.S.C.

Motion was:

☒ Opposed

☐ Unopposed

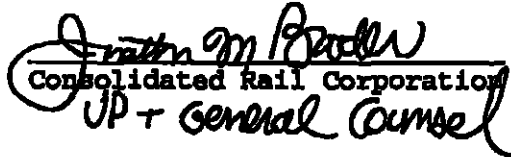
Exhibit B

**JOINDER AND CONSENT TO APPLICATION FOR RELIEF FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION**

The undersigned hereby joins in and consents to the pending application of 212 MARIN BOULEVARD, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date


Consolidated Rail Corporation
VP + General Counsel

**JOINDER AND CONSENT TO APPLICATION FOR RELIEF FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION**

The undersigned hereby joins in and consents to the pending application of 389 MONMOUTH STREET, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date

Jonathan M. Bonds
Consolidated Rail Corporation
VP + General Counsel

**JOINDER AND CONSENT TO APPLICATION FOR RELIEF FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION**

The undersigned hereby joins in and consents to the pending application of 354 COLE STREET, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/02
Date

Jonathan M. Broder
Consolidated Rail Corporation
VP + General Counsel

**JOINDER AND CONSENT TO APPLICATION FOR RELIEF FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION**

The undersigned hereby joins in and consents to the pending application of 280 ERIE STREET, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date

Jonathan M. Buer
Consolidated Rail Corporation
VP + General Counsel

CONSENT TO FILING APPLICATION

The undersigned hereby joins in and consents to the pending application of 317 JERSEY AVENUE, LLC for Certificate of Appropriateness and a Certificate of Economic Hardship for Demolition of portion of the Sixth Street Embankment on this tract, and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date

Jonathan M. Broun
Consolidated Rail Corporation
VP + Gen. Counsel

**JOINDER AND CONSENT TO APPLICATION FOR RELIEF FROM THE
JERSEY CITY HISTORIC PRESERVATION COMMISSION**

The undersigned hereby joins in and consents to the pending application of 247 MANILA AVENUE, LLC for a Certificate of Appropriateness for demolition of the Sixth Street Embankment and a Certificate of Economic Hardship and supplements the application with the following information:

Name: Consolidated Rail Corporation
Address: 2001 Market Street
Philadelphia, PA 19103
Telephone (Work): (215) 209-2000

12/13/07
Date

Jonathan M. Beck
Consolidated Rail Corporation